

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 22, 2009

VINCENT MARCEL WILLIAMS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamilton County
No. 261487 Don W. Poole, Judge

No. E2009-00732-CCA-R3-PC - Filed March 8, 2010

The Petitioner, Vincent Marcel Williams, filed a timely petition for post-conviction relief attacking his convictions for aggravated child abuse and reckless homicide on the basis that trial and appellate counsel committed ineffective assistance. Following a full evidentiary hearing, the Hamilton County Criminal Court denied relief. In this appeal as of right, the Petitioner contends that counsel committed ineffective assistance by failing: (1) to challenge, either at trial or as an issue on appeal, the impaneling of biased jurors; (2) to argue that the Petitioner was guilty of reckless aggravated assault rather than aggravated child abuse; (3) to challenge, either at trial or as an issue on appeal, the allegedly improper comments made by the trial court during voir dire; and (4) to examine witnesses concerning the Petitioner's proposed questions relating to other possible causes and perpetrators of the victim's injuries. Following our review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Michael L. West, Chattanooga, Tennessee, attorney for the appellant, Vincent Marcel Williams.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; William H. Cox, III, District Attorney General; and Cameron Williams, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The Petitioner's convictions arise from the August 1, 2001 death of his seven-month-old daughter as a result of Shaken Baby Syndrome. The Hamilton County grand jury indicted the Petitioner for felony murder and aggravated child abuse. He was convicted of the lesser included offense of reckless homicide and of aggravated child abuse and received an effective sentence of twenty-five years to be served at one hundred percent. This court affirmed his convictions and sentence on direct appeal. State v. Vincent Marcel Williams, alias Vincent Marcel Wilkes, No. E2004-00355-CCA-R3-CD, 2005 WL 941021 (Tenn. Crim. App. Apr. 22, 2005), app. denied (Tenn. Oct. 24, 2005). The Petitioner filed a timely petition for post-conviction relief alleging that his convictions were the result of the ineffective assistance of both trial and appellate counsel. Following the appointment of counsel and amendment to the petition, an evidentiary hearing was held during which the Petitioner, trial counsel, and appellate counsel testified.

Trial counsel testified that he was licensed to practice law in 1995 and had tried four homicide cases during his career. He stated that, just prior to the Petitioner's trial, he had tried another child abuse murder case that resulted in an acquittal on the felony murder charge. Of note, at the opening of the evidentiary hearing, post-conviction counsel, with reference to the Petitioner's case, acknowledged "that the portion of the case that dealt with first degree murder must have been handled well, inasmuch as it resulted in a reckless homicide as opposed to first degree murder; however, most of our attention will be on . . . the aggravated child abuse case."

Relative to the Petitioner's specific allegations, trial counsel testified that he tried to avoid using jurors with especially young children but that it would be almost impossible to avoid any jurors who were grandparents or parents. He recalled that he used all his peremptory challenges and that he consulted the Petitioner regarding each juror. When asking a potential juror if his or her feelings about a child victim would affect the fairness of their decision-making, trial counsel testified that he usually followed up any equivocal responses given by a potential juror with further questioning. He also stated that he treated with more skepticism those potential jurors who told him that the age of the victim would have no effect on their decision-making.

Trial counsel testified that the Petitioner's wife, April, was always listed as a State's witness, and he stated that he "loved that . . . because then it gave me cross-examination and I could lead her wherever I wanted." He also stated that had the State not called April in their case-in-chief, he would have called her as a defense witness because she always had claimed the Petitioner's innocence.

Regarding the Petitioner's allegation that trial counsel should have argued that the Petitioner was guilty of reckless aggravated assault as a lesser included offense of aggravated child abuse, trial counsel testified that he learned long ago that "you can't ride two horses." He stated that in light of the Petitioner's complete denial of any responsibility for the offenses, he decided that they could not change their defense theory during the trial without risking their credibility with the jury. He stated that the Petitioner "never indicated to me that he ever did anything to the baby. He always maintained his innocence. And that's why the argument of an alternative theory . . . wasn't viable to argue."¹

Trial counsel recalled the arguably improper remarks made by the trial court during voir dire and stated that he objected to the comments and included them as an issue in the motion for a new trial. He also recalled a heated exchange with the trial court during the motion for a new trial hearing concerning whether the comments amounted to reversible error. He testified that the issue was not raised by appellate counsel on direct appeal.

Trial counsel testified that he and the Petitioner discussed that other family members may have caused the victim's injuries. However, after interviewing the family members, he determined that many of them held the Petitioner responsible for the victim's death and, thus, would not make effective witnesses for the defense. He also recalled that after interviewing a family friend named Nicole at the Petitioner's direction, trial counsel determined that Nicole could offer no specific testimony about the victim's behavior in the days preceding her death.

Regarding the Petitioner's allegation that trial counsel was deficient in failing to call an expert witness concerning how adverse reactions to vaccinations sometimes mimic Shaken Baby Syndrome, trial counsel stated that he had consulted Dr. Cleland Blake regarding his previous child abuse murder case and Dr. Blake had determined that he would be of no help to that defendant. Trial counsel testified that the injuries suffered by the victim in the Petitioner's case were much more extensive, so he decided that an "adverse reaction" defense could not be pursued. However, trial counsel did ask the State's medical examiner, Dr. Stanton Kessler, on cross-examination whether brain injuries had been linked to vaccinations in the medical research in an attempt to create some reasonable doubt as to the cause of the victim's death.

¹ Trial counsel also testified that the Petitioner had given an incriminating statement to investigators which he claimed was coerced in order to obtain the return of his older daughter to her mother, April. The statement indicated that the Petitioner was angry with April and had bounced the infant, face down on the bed, "with [his] hand on the back, pushing the child, bouncing it on the mattress."

The Petitioner testified that he wanted trial counsel to present other witnesses to testify about the victim's behavior earlier on the day that she was left in the Petitioner's care. He also learned from his wife of previous falls the victim suffered that might have contributed to the medical examiner's finding of "old blood" on the victim's brain. Regarding his overall opinion of trial counsel, the Petitioner testified, "I thought he was a decent lawyer for the case and we had a good relationship." He also admitted that trial counsel had adequately represented him.

Appellate counsel testified that she had handled hundreds of appeals during her nineteen-year legal career. When asked why she did not include the trial court's improper comments or juror bias issues on appeal, she explained that she chose the strongest issues to present on appeal and believed that to be the best strategy. She also stated that after reviewing the trial court's comments, which she still opined to be improper, she determined that they would not amount to reversible error on appeal and were merely general statements concerning the average person's reluctance to sit on a trial involving the death of a child.

ANALYSIS

The burden in a post-conviction proceeding is on the petitioner to prove the factual allegation to support his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-372 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

The post-conviction court found that the Petitioner failed to prove his allegations by clear and convincing evidence. The court specifically found that trial counsel was not deficient concerning the issues of juror bias, the examination of the Petitioner's wife during the State's case-in-chief, the presentation of other witnesses, or the presentation of dual defense theories. The court also found that the Petitioner failed to show any prejudice regarding trial counsel's performance relative to the presentation of expert testimony or objections to the trial court's comments. The court also found that appellate counsel's decisions regarding the presentation of issues were reasonable strategic decisions. Accordingly, the post-conviction court denied relief.

Relative to each allegation raised by the Petitioner, we conclude that the evidence does not preponderate against the trial court's findings. The transcript of the jury selection is absent from this record and the evidence presented at the post-conviction hearing does not establish any juror bias. Likewise, the evidence presented at the post-conviction hearing does not establish any deficient performance regarding the trial court's comments during voir dire. Counsel's decision not to present of a dual defense theory was not deficient. We also note that the Petitioner failed to present any testimony by any of the alleged lay or expert witnesses which he claims could have created some reasonable doubt as to the cause or perpetrator of the victim's injuries and death. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App.1990). As admitted by the Petitioner, trial counsel represented the Petitioner adequately throughout all stages of the proceedings. Therefore, we conclude that the Petitioner failed to prove his allegations by clear and convincing evidence. The judgment of the post-conviction court is affirmed.

CONCLUSION

In consideration of the foregoing and the record as a whole, the post-conviction court's denial of relief is affirmed.

D. KELLY THOMAS, JR., JUDGE